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Before The
FEDERAL COMMUNICATIONS COMMISSION

raise procedural hurdles in the paths of aggrieved competitors, and seeks the benefit of an affiliation standard that arbitrarily favors cable over telephone companies. The cable industry's arguments, however, have no more merit today than when they were rejected before.

Moreover, both Congress and the Commission have recognized that the ability to obtain access to existing sources of programming on reasonable terms is critical to the development of competing distribution systems, including video dial tone. Absent strict enforcement of the program access provisions in the 1992 Act, however, the cable industry will be free to continue the very practices which Congress found have impeded competition. Consequently, cable's continuing efforts to avoid meaningful program access rules must be rejected.

2. The Commission's Rules Must Prohibit The Discriminatory Conduct That The Cable Industry Seeks To Validate

As the Commission itself has recognized,[2] the 1992 Cable Act mandates the adoption of rules prohibiting discrimination "in the prices, terms, and conditions of sale or delivery" of video programming.[3] Notwithstanding this statutory mandate, cable interests continue to argue that the Commission discriminatory conduct. These arguments are flatly contrary to the statute and must be rejected.

First, cable interests argue that the Commission should permit cable-affiliated programmers to charge new multichannel distributors more for programming than these same programmers charge affiliated cable operators under existing contracts.[4] This discrimination should be permitted, so the argument goes, for as many years as the existing contracts remain in effect

Second, the cable incumbents resurrect the claim that the Commission should establish a so-called de minimus exception to its discrimination rules. According to the latest iteration of the argument, cable-affiliated programmers should automatically be permitted to charge discriminatory rates if 5 percent or fewer of its revenues are derived from sales to affiliated cable operators.[7] And while even the cable incumbents have dropped the argument that price differences of as much as 30% should automatically be permitted in all cases,[8] they continue to argue that price differences of 5% or less should effectively be presumed lawful and a heavy burden placed on competing distributors to prove otherwise.[9]

Cable's attempts to support these exceptions completely miss the point. As the Commission itself recognized, Congress has expressly forbidden all discriminatory practices except for differences that are justified by four statutorily specified factors.[10] These justifications include cost and volume based differences, differences in the credit worthiness of the exclusive contract.[11] None of these factors comes into play as a justification for the exceptions proposed here, however, and not even the cable monopolists argue they do.

Third, the cable incumbents repeat their previously rejected claim that a cable-affiliated programmer should be permitted to engage in discriminatory conduct based on differences in buyers' -- as opposed to the programmer's -- costs.[12] But both the statutory language[13] and simple common sense make clear that a difference in the buyers' costs cannot justify a price differential unless they have a demonstrable impact on the seller's costs.[14] And as the Commission itself found, permitting programmers to discriminate on this basis would not only be contrary to the Act, but would also disserve the public interest by artificially raising the retail price of

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[11] See 47 U.S.C. § 548(c)(2)(B).

[12] The sole basis for this claim is a brief and ambiguous colloquy on the Senate floor. See Viacom Pet. at 13. As the courts have made clear, however, these kinds of snippets from the legislative history are entitled to little weight. See, e.g., Weinberger v. Rossi, 456 U.S. 25, 35 (1982) (Court eschewed reliance on the passing comments of one member); RCA Global Communications, Inc. v. FCC, 758 F.2d 722, 733 (D.C. Cir. 1985) (reliance on an isolated comment during Senate debate is entitled to "little weight").

[13] See 47 U.S.C. § 548(c)(2)(B).

[14] For example, if a buyer spent comparatively little on advertising and promotion, a programmer might have to spend more locally to make up for it.

programming and by discouraging the development of new technologies.[15]

3. The Commission's Rules Must Prohibit The Practices Specified In The Act Without Requiring Particularized Showings Of Harm

The cable interests also renew their claim that the statute requires a particularized showing of harm in every case before a competing distributor can complain about conduct that

The second provision, in contrast, identifies specific practices that Congress concluded have been used to impede competition, and that the Commission -- "[a]t a minimum" -- must prohibit.[19] As a result, Congress provided in unqualified terms that the regulations must "prevent" undue or improper influence, "prohibit" discrimination, and "prohibit" exclusive contracts.[20] These specific practices are *per se* unlawful, and no "threshold" showing of harm can be required to establish a violation of the Act.

Moreover, the statute expressly grants "[a]ny multichannel video programming distributor aggrieved by conduct that it alleges constitutes a violation" of these specific prohibitions to "commence an adjudicatory proceeding at the Commission."[21] Simple common sense dictates that a competing distributor is "aggrieved" whenever it is denied access to programming, or is given access on disadvantageous terms, as a result of a violation of these prohibitions. The notion that a

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[19] 47 U.S.C. § 547(c)(1) (directing the Commission to "prescribe regulations to specify particular conduct that is prohibited"); *see also* H. Conf. Rep. No. 102-862, 102d Cong., 2d Sess. at 92 (1992) ("Conf. Report") ("the regulations must prevent" and "prohibit" the specific practices); H.R. Rep. No. 102-628, 102d Cong., 2d Sess. at 43 (1992) ("House Report") ("the legislation requires the FCC to promulgate rules to prohibit" the specific practices).

[20] 47 U.S.C. § 548(c)(2)(A-(D).

[21] 47 U.S.C. § 548(d).

such a distributor can only bring a complaint if it first makes a threshold showing of particularized competitive harm is absurd.[22]

4. **The Commission's Rules Must Prohibit The Conduct Specified In The Statute Without Geographic Limits**

The cable incumbents also claim that the specific prohibitions contained in the Commission's rules should apply only in geographic areas where a cable operator affiliated with a vertically integrated programmer operates a cable system.[23] Again, however, cable's argument is flatly contrary to the statute.

Congress directed the Commission to prohibit vertically integrated cable operators and satellite programmers from engaging in all of the practices specified in the statute.[24] Congress did not give the Commission discretion to decide which of these practices should be prohibited, nor did it give the Commission discretion to decide where they should be prohibited. As a result, the Commission correctly concluded that its rules

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[22] If a competing distributor were to bring a complaint seeking damages as well as declaratory relief, see infra pp. 11-12, it would necessarily have to quantify its injury in order to recover on its damages claim. Under the statute, however, no such showing can be required to obtain declaratory relief or to compel compliance.

[23] TWE Pet. at 7.

[24] 47 U.S.C. § 548(c). Likewise, the statute's broader prohibition against other types of unfair or deceptive acts or practices applies without geographic limitation to all cable operators, all vertically integrated satellite cable programmers, and all satellite broadcast programmers. 47 U.S.C. § 548(b).

should apply without geographic limits,[25] and cable's belated attempt to rewrite the express language of the statute must be rejected.

5. **The Commission Must Apply An Attribution Standard To Cable That Is At Least As Stringent As That Applied To Telephone Companies**

The cable interests also again urge the Commission to adopt an attribution standard for use here that is more lenient than the standard that applies under the 1984 Act's ban against telephone company provision of video programming.[26]

Cable's argument that it is entitled to preferential treatment, however, is meritless. The purpose of the attribution standard under the program access rules is to define a threshold below which a cable operator will not control a programmer's actions. This is the same purpose that the attribution standard purports to play under the rules banning telephone companies from providing video programming.[27]

While it is true that the attribution standard that applies to telephone companies is unduly stringent and should be

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[25] Order at 5, 12.

[26] Liberty Media Pet. at 8.

[27] <u>See</u> 47 U.S.C. § 533(b) (applying the ban to telephone company affiliates under common ownership or control).

modified,[28] this does not justify granting preferential treatment to cable in the interim. In fact, if the Commission distinguishes between the two industries, it can reasonably do so only by applying a stricter standard to cable than applies to telephone companies, for two reasons. First, the 1992 Act bars cable operators from exercising "influence" over a programmer, whereas the 1984 Act's ban against telephone companies providing video programming applies only to programmers under common ownership or control.[29] Second, both Congress and the Commission concluded that cable has used its transport monopoly to impede the development of independent programming sources,[30] while using its control of available programming to impede the development of competing distribution systems.[31] These conclusions justify applying a stricter -- rather than more lenient -- standard to cable.

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[28] In particular, the Commission's telco-cable rules must be modified in two respects to conform to the 1984 Act; the "carrier-user" restriction must be eliminated, and interests of greater than 5 percent that do not constitute "ownership" or "control" must be permitted. See Petition of Bell Atlantic for Limited Reconsideration, CC Dkt 87-266 (filed Oct. 9, 1992).

[29] Compare 47 U.S.C. § 548(c)(2)(A) with 47 U.S.C. § 533(b).

[30] E.g., Competition, Rate Regulation and the Commission's Policies Relating to the Provision of Cable TV Service, 5 FCC Rcd 4962, 5021-32 (1990); House Report at 41 ("vertically integrated [cable] companies reduce diversity in programming by threatening the viability of rival cable programming services").

[31] Id.

6. **The Commission Should Permit Damage Claims From Cable Operators And Programmers Who Violate The Act**

The Commission should, however, reconsider its order in one limited respect. Specifically, it should permit complaining multichannel distributors to seek damages if they have been injured by a violation of the Act.[32]

There is no question that the Commission is authorized to grant damages in appropriate instances. In the 1992 Act, Congress granted the Commission broad "power to order appropriate remedies" for violations of the statute's program access provisions.[33] This broad grant alone is sufficient to give the Commission authority to award damages. In addition, however, the Act also expressly gives the Commission authority to "establish prices, terms and conditions" for the sale of programming, and to grant all other remedies provided for under "any other provision of this Act."[34] These "other provisions" of the Communications Act expressly provide for the recovery of damages.[35]

Moreover, exercising this authority to grant damages in appropriate instances will serve the public interest objectives

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32 NRTC Pet. at 6.

33 47 U.S.C. § 548 (e)(1).

34 47 U.S.C. § 548(e)(1)-(2).

35 <u>See</u>, <u>e.g.</u>, 47 U.S.C. §§ 207, 209.

that underlie the program access rules. The availability of damages will help to deter the types of conduct that Congress found have been used by cable to impede competition. And compensating multichannel distributors for their injury will promote deployment of competing technologies by helping to ensure that cable incumbents cannot torpedo the financial ability of new competitors to deploy these technologies.

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July 14, 1993

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Comments of Bell Atlantic on Petitions for Reconsideration" was served this 14th day of July, 1993, by delivery thereof by first class mail, postage prepaid, to the parties on the attached list.

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